UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA *ex rel*. ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al.*, Defendants.	Civil Action No. 3:21-cv-00748 JUDGE RICHARDSON MAGISTRATE JUDGE FRENSLEY JURY TRIAL

UNITED STATES' REPLY MEMORANDUM OF LAW
FURTHER SUPPORTING ITS MOTION TO PARTIALLY INTERVENE

The government is seeking to intervene in this case to use its own resources and expertise to litigate claims alleging fraud on the government. There has been no substantive motion practice or discovery. And the main reason the government is seeking to intervene now, rather than earlier, is that it had a year of (ultimately unfruitful) settlement discussions, at Defendants' request.

Defendants' arguments against intervention are meritless. First, because government intervention to protect its own interests is a modest step, courts construe the good cause standard as lenient and broadly defined, not heavy and narrow as Defendants argue. Second, Defendants identify no genuine prejudice to their litigation position if the government intervenes at this early stage. Third, intervention now will advance the public interest.

ARGUMENT

A. Defendants Misconstrue the Legal Standard for "Good Cause," Which Is Easily Met

1. The Good Cause Standard is Lenient

Contrary to Defendants' arguments, the False Claims Act's (FCA's) good cause standard for intervention is lenient, and easily satisfied where, as here, the prejudice to other parties will be

minimal. Other than the bench ruling in *U.S. ex rel. Odom, et al. v. Southeast Eye Specialists, PLLC et. al*., No. 3:17-cv-00689 (M.D. Tenn.) ("*SEES*"), Defendants have not identified a single case where a court denied a motion under the good cause standard.[1]

The purpose of the good cause standard is to prevent undue prejudice to other participants in a case, not to scrutinize the government's investigative efforts. Ultimately, "[t]he primary purpose of the FCA was to protect the government from fraud, so the government should be able to intervene when necessary to protect its own interests." *Griffith v. Conn*, No. 11-157-ART-EBA, 2016 WL 3156497, at *3 (E.D. Ky. Apr. 22, 2016) (Thapar, J.). Requiring a significant prima facie showing from the government—the true victim, and the real party in interest—would undermine the statute's purpose of protecting public funds from fraud. Rather, the purpose of the "good cause" standard is to protect the interests of other parties to the case—defendants and relators. *Id*.

The primary constraint on the government's ability to intervene for good cause is therefore the *balance* between the prejudice (if any) to other parties and the government's reasons for seeking intervention after unsealing. *United States ex rel. Ross v. Indep. Health Corp.*, No. 12-CV-299S, 2021 WL 3492917, at *2 (W.D.N.Y. Aug. 9, 2021) (citing *Griffith*, 2016 WL 3156497, at *3). It follows that the government's burden to justify intervention is low where, as here, the prejudice to other parties is minimal. Defendants' suggestion that the good cause standard must be interpreted strictly is a solution looking for a problem where none exists. Def. Br. 18.

2. <u>The Good Cause Standard Is Broadly, Not Narrowly, Defined</u>

To be sure, the government must demonstrate "good cause," but the standard is flexible, not rigid. All that the government must affirmatively provide is "some justification" for its

[1] *Cf. United States ex rel. Drennen v. Fresenius Med. Care Holdings, Inc.*, No. CV 09-10179-GAO, 2017 WL 1217118, at *8 (D. Mass. Mar. 31, 2017) ("None of the parties have found any cases where [] a motion to intervene was denied (at any time in the litigation) …").

intervention decision. *Indep. Health*, 2021 WL 3492917, at *2 (quoting *Griffith*, 2016 WL 3156497, at *3). Defendants' attempt to narrowly define "good cause" misstates the law.

Contrary to Defendants' argument (Def. Br. 9-12), the FCA does not require the government to show, specifically, that it has unearthed "new and significant evidence" that "escalated the magnitude of the fraud." That language comes from the Senate Report accompanying 1986 FCA amendments. Had Congress meant to impose a specific evidentiary requirement for intervention, it would have done so. It did not. The *Griffith* court rejected precisely this argument: "Courts may use legislative history only to help clarify the meaning of unclear or ambiguous terms in statutes, not to add new words or requirements into a statute." 2016 WL 3156497, at *2 n.1 (citing *Brilliance Audio, Inc. v. Haights Cross Communs., Inc.*, 474 F.3d 365, 371–72 (6th Cir. 2007)). Other courts have held that new evidence is just one basis to find good cause, not a requirement. *See, e.g.*, *United States ex rel. Capshaw v. White*, No. 3:12-CV-4457-N, 2017 WL 11511289, at *1 (N.D. Tex. Apr. 25, 2017) ("Good cause may include a showing of changed circumstances, the discovery of additional information, or a variety of other factors.").

Of course, if the government does discover "new, probative evidence," that will support a finding of good cause. *Indep. Health*, 2021 WL 3492917, at *2. Here, the government did obtain new, probative evidence after February 2020. Among other things, the government took sworn testimony from Defendants' former chief medical officer, as well as another employee, in May 2020. Nine days later, the government requested, and later received, a sample of 360 forms completed for specific Cigna beneficiaries during the in-home assessments at issue in the case. These Cigna-designed forms document the examination and findings conducted during the 360 visits, as well as the putative diagnoses generated during these visits. Following time-consuming expert analysis, these records revealed that certain conditions diagnosed during the in-home

assessments lacked clinical basis. Among other things, these records showed that certain conditions were diagnosed without necessary testing or equipment. These sample records will support the allegations in the government's complaint in intervention.

Nor does the good cause standard necessitate an inquiry into whether the government might have obtained evidence more quickly or intervened earlier, as Defendants contend. Def. Br. 2, 9. For example, in *Independent Health*, the court found it "unnecessary" to resolve disputes "over the circumstances and materiality" of new disclosures, including "whether the government diligently sought this information and whether Defendants obfuscated," because it was "enough that the government has identified previously undisclosed documents containing seven years of data that it views as significant and material to the scope of the alleged fraud." 2021 WL 3492917, at *3. Likewise, assessing the weight or significance of new evidence is a task for trial, not a motion to intervene. *See Fresenius*, 2017 WL 1217118, at *6.

Finally, the only period the government must account for is the time from its February 2020 partial declination notice, to January 11, 2022, when it moved to intervene. That is because courts consider only why the government decided to intervene after previously declining to do so. *Griffith*, 2016 WL 3156497, at *3. The FCA provides the government an initial 60-day period to investigate a relator's claims of fraud while the case remains sealed, but that time can be—and was here—extended by court orders through February 2020. Defendants' argument that the clock begins when this suit was filed in October 2017 (*e.g.*, Def. Br. 12-13) ignores this. It also effectively seeks to undermine the previous court orders allowing additional time for investigation.

The good cause requirement "was not created just for the sake of limiting government intervention," or to scrutinize the details or diligence of the government's investigation, but to "provide protection to relators and defendants from unfair prejudice due to an untimely

intervention from the government." *Griffith*, 2016 WL 3156497, at *3. Requiring a fact-intensive inquiry into the government's investigation, as Defendants urge, would subvert the FCA's "primary purpose," which is "to protect the government from fraud." *Id*. Regardless, the government would prevail here, because it has obtained new evidence, including testimony from Defendants' former medical director and 360 records for a sample of Cigna's beneficiaries, that in part will form the basis for the government's anticipated complaint in intervention.

B. Defendants Fail to Identify Any Genuine Prejudice

The good cause standard is easily met in this case because intervention would not harm the interests of the other parties in this litigation: Relator consents, Defendants have not yet moved to dismiss, and no discovery has been taken.

Defendants raise generic arguments that the government's investigation has already harmed them, pointing to "the cost of complying" with the government's civil investigative demands, their need to disclose the investigation in securities filings, and the "shadow" that the investigation has cast over its "operations." Def. Br. 14-15. However, these issues pertain to any entity subject to a government FCA investigation and are legally irrelevant to "good cause."

Rather, the correct analysis of prejudice is functional and forward-looking: how would government intervention now affect other parties *going forward*? As it would when considering intervention in other litigation under Federal Rule of Civil Procedure 24(b)(3), "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Fresenius*, 2017 WL 1217118, at *8 (allowing intervention after close of fact discovery). After all, Relator is entitled to litigate whether or not the government intervenes. Notably, the *SEES* Court did not weigh the government's reasons for intervention against prejudice to other parties—the heart of the test in *Griffith* and applied again in *Independent Health*.

Here, there has been no motion to dismiss and no discovery. There is no credible claim of prejudice. This case is like many others where courts have permitted the government to intervene for good cause before discovery. *See, e.g., U.S. ex rel. Roberts v. Sunrise Senior Living, Inc.*, No. CV 05-3758-PHX-MHM, 2009 WL 499764, at *1 (D. Ariz. Feb. 26, 2009); *U.S. ex rel. Lazar v. S.M.R.T., LLC*, No. 318CV00822BENBGS, 2021 WL 5014284, at *2 (S.D. Cal. Oct. 28, 2021). Courts also have routinely permitted intervention when a case is early in discovery. *See, e.g.*, *U.S. ex rel. Hall v. Schwartzman*, 887 F. Supp. 60, 62 (E.D.N.Y. 1995); *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 950 F. Supp. 1046, 1049 (D. Colo. 1996); *Sharpe ex rel. United States v. Americare Ambulance*, 2017 WL 2986258, *1-2 (M.D. Fla. July 13, 2017). [2] As the *Independent Health* court put it, "[w]hile Defendants may understandably be displeased with the length of the government's investigation and the timing of its intervention motion, the fact remains that this case is procedurally in its infant stages, with discovery not having yet commenced," so there would be no unfair prejudice to the defendants. 2021 WL 3492917, at *3-4.

Defendants' argument that allowing the United States to intervene now would "reset[] the terms of this case after more than four years" is meritless. Def. Br. 2. The government proposes to pursue a theory of liability narrower than Relator's, so the scope of discovery will be unaffected by intervention (though broader discovery would not be a basis to deny intervention, *see United States v. Aseracare Inc.*, No. 2:12-CV-245-KOB, 2012 WL 4479123, at *2 (N.D. Ala. Sept. 24, 2012))). And Defendants have been on notice about the government's theory and anticipated allegations since fall 2020, when settlement negotiations started.

[2] In the rare case where the government has sought intervention late in litigation, courts have taken appropriate steps to minimize prejudice—while still allowing intervention. *See, e.g.*, *Fresenius*, 2017 WL 1217118, at *2 (permitting intervention after close of discovery, but barring government from taking additional discovery).

Perhaps recognizing the lack of real prejudice from intervention, Defendants instead attempt to argue (*e.g.*, Def. Br. 14) that the government has unjustly delayed this litigation. This is mistaken. The fact that, nearly two years after the government's February 2020 partial declination decision, no discovery or motion practice on the merits has occurred is largely the result of Defendants' own choices of litigation strategy.

The docket itself illustrates why this case "is procedurally in its infant stages." *Indep. Health Corp.*, 2021 WL 3492917, at *3. The government's partial declination decision came in February 2020. (ECF No. 13.).[3] For unclear reasons—though not because of any action or inaction by the government—the case was not unsealed until August 2020. (ECF No. 11 (docketed August 3, 2020, but providing that the case should be unsealed as of April 10, 2020).) In early September 2020, Defendants—consistent with local practice—filed a letter requesting a pre-motion conference on a motion to transfer the case to this District. (ECF No. 44.) Simultaneously, Defendants—*opposed* by Relator—sought to stay their obligation to respond to Relator's amended complaint while the motion to transfer was pending. (ECF No. 45.) On September 28, 2020, the Court scheduled a pre-motion conference for October 8, 2020. (ECF No. 61.) But only days later—on October 1—Defendants requested an adjournment of the conference to engage in discussions with the government. (ECF No. 64.) As Defendants wrote, the parties "have recently been in contact regarding the remaining claims" as to which the government had made no intervention decision, so Defendants, "[j]ointly with the Government, [] request a temporary adjournment of the pre-motion conference to allow the Defendants and the Government sufficient time to discuss the Government's position as to the remaining claims." (ECF No. 64.) The Court granted the request. (ECF No. 65.) Thus, regardless of whether the parties engaged in settlement discussions

[3] The notice is docketed with a date of August 6, 2020, but—as the notice itself makes clear—it was submitted under seal to the Court on February 25, 2020, only weeks before the global pandemic reached the United States.

starting in fall 2020—though, as noted below, they did—Cigna cannot claim prejudice from purported government delay from adjournments of court proceedings sought by *Cigna itself*.

And the parties did begin settlement discussions promptly. A week after Defendants' letter—on October 8, 2020—the government made a presentation to Defendants setting forth its factual findings and legal claims for the purposes of initiating settlement discussions. Though Cigna now questions whether the five following months were part of the parties' settlement discussions, Def. Br. 6-7, Cigna's own presentations to the government in October 2020 and January 2021 are marked "FRE 408—SETTLEMENT PRIVILEGE." Indeed, Defendants filed a letter on the docket on November 11, 2020, noting the ongoing discussions with the government. ECF No. 68. For several reasons, the settlement discussions took a significant amount of time, continuing through October 2021. Both sides engaged in expert review of the sample 360 forms produced by Cigna in June 2020. Defendants changed counsel mid-negotiation, and, at one point, suggested using a new patient sample for the purpose of calculating potential damages for settlement purposes, only to reverse course shortly thereafter. In addition, the parties had prolonged negotiations regarding the language of the non-monetary terms to be included in a potential settlement agreement. Had Defendants been concerned during this time about potential delay to the litigation, they could have walked away from the negotiating table. They were well aware during these settlement discussions that the government would likely seek to intervene.

After a conference on November 12, 2020, the assigned SDNY judge set a briefing schedule on Defendants' motion to transfer. (ECF No. 70.) The motion was fully briefed on February 10, 2021. (ECF Nos. 95-97.) On July 7, 2021, the Court set oral argument on the transfer motion for July 29. (ECF No. 102.) Defendants—now represented by their current counsel—requested an adjournment, which the Court granted while noting no further adjournments would

be granted. (ECF No. 110.) Argument was held on September 17, 2021; the Court stated that it would grant the transfer motion, effective at the end of that month. (Unnumbered ECF Entry (Sep. 17, 2021).) The case was transferred on September 29. (ECF No. 127.)

This Court set an initial case management conference for December 7. (ECF No. 133.) Because the settlement discussions between the government and Defendants had by this time failed, the government requested the Court reschedule the conference so that the government could make a final determination about whether to intervene—a formal process requiring internal approvals from the Civil Division of the Department of Justice—which the Court granted over Defendants' opposition. (ECF No. 154.) In the meantime, Defendants requested an opportunity to present to the Civil Division of the Department of Justice on why, in their view, the government should not intervene. That meeting, which lasted more than an hour, was held on December 14, 2021. The government filed its motion to intervene on January 11, 2022.

Thus, the only delay in this litigation since February 2020 plausibly attributable to the government is the request to adjourn the initial conference by a month. And even during that time, Defendants made a presentation to the Department of Justice. The lion's share of the time since February 2020 was devoted to voluntary settlement discussions, and included Defendants' own requests for adjournments and a stay of their initial deadline to respond to the Relator's amended complaint. Defendants could have filed their contemplated motion to dismiss at any time.

C. Intervention Will Serve the Public Interest

Finally, contrary to Defendants' argument, intervention at this stage will serve, not hinder, the public interest. This case will be more effectively and efficiently litigated with the government's involvement as a party given its expertise with the Medicare Advantage Program,

including the Program's risk adjustment payment regulations and processes, as well as its experience litigating similar risk adjustment FCA cases in other district courts.

Defendants argue that intervention would be "squarely at odds with the expressed intent of Congress" because Congress intended the "good cause" requirement to be strict and require a specific showing of new evidence. Def. Br. 17-18. But as discussed above, that argument mistakenly seeks to transform legislative history into statutory text. *See supra* Section B; *Griffith*, 2016 WL 3156497 at *2 & n.1.

The fundamental purpose of the FCA is "to provide for restitution to the government of money taken from it by fraud." *U.S. ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 413 (6th Cir. 2002) (citing *United States v. Hess,* 317 U.S. 537, 551 (1943)). That statutory purpose would be undermined if the government were prevented from employing its own resources and expertise to litigate FCA cases, such as this one which alleges widespread fraud in the submission of patient diagnoses to artificially inflate Medicare Advantage Program payments. This is likely why the overwhelming majority of courts to consider the "good cause" standard, under a variety of circumstances, have found it met. Forcing the government to make quick intervention decisions without full investigation, engagement with defendants, and time for potential settlement discussions (if the defendants wish) is not in anyone's interest.

CONCLUSION

Thus, for the above reasons, the Court should permit the United States to intervene and to file its notice of partial intervention and complaint in intervention within thirty days of the Court's order on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on February 1, 2022, by electronic means via the Court's electronic filing system, to the following:

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